Quizhpe v Luvin Construction
2008 NY Slip Op 33491(U)
December 12, 2008
Supreme Court, Nassau County
Docket Number: 21761/06
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

SEGUNDO QUIZHPE,

Plaintiff,

-against-

LUVIN CONSTRUCTION, BIAGIO VIGLIOTTI AND JOSE I. SANCHEZ,

Defendants.

MOTION DATE: 10/14/08
MOTION SEQ. NO.: 003, 004

INDEX NO.:21761/06

The following papers having been read on the motion (numbered 1-3):

<u>Motion Seq. No.: 003</u>
Notice of Motion..1
Affirmation in Oppositon..2
Reply Affirmation..3

<u>Motion Seq. No.: 004</u>
Notice of Motion..1
Affirmation in Opposition..2
Reply Affirmation..3

Relief Requested:

The plaintiff, Segundo Quizhpe, moves pursuant to CPLR §3212 for an order granting summary judgment as to the issue of liability and dismissing all affirmative defenses in the defendant's Answer. The application is hereby **DENIED** for the reasons set forth hereinafter (Sequence #003).

The defendant's Luvin Construction Corp. and Jose I. Sanchez move pursuant to CPLR §3212 seeking an order granting summary judgment dismissing the plaintiff's complaint. The application is hereby **GRANTED** for the reasons set forth hereinafter

(Sequence #004).[1]

Factual and Procedural Background:

The underlying action was commenced by the plaintiff as a result of injuries he sustained in a one vehicle accident which occurred at 7:30 a.m. on July 21, 2006 while he was a passenger in a 1998 Nissan minivan operated by defendant Jose I. Sanchez and owned by co-defendant Luvin Construction (*see* Affirmation in Support of Plaintiff's Motion at Exhs. E, F). Luvin Construction is presently doing business as FML Construction (*id.*).

The Court begins its inquiry of the issues herein raised with an examination of the plaintiff's sworn deposition testimony, as well as that of defendant Jose I. Sanchez.

Deposition Testimony of Plaintiff Segundo Quizhpe:

The plaintiff stated that on the day of his accident he was employed by FML Construction in the capacity of a construction worker and was traveling in the minivan to a particular work site accompanied exclusively by other co-employees, including Jose I. Sanchez, the driver of the minivan (*id.* at F at pp. 6,7,11,12,14). He testified that as the van was moving on the parkway, it "began to shake" and thereafter "overturned about three times" causing him to sustain injury to his right shoulder and neck (*id.* at pp. 16,19,22,23,43). The plaintiff stated that as a result of the accident he filed a claim for workers' compensation and as of the date of his deposition was receiving benefits in the amount of $400 per week (*id.* at pp. 24,37).

Deposition Testimony of Defendant Jose I. Sanchez:

Defendant Sanchez testified that on the day of the accident he was employed by FML Construction and was directed by the company to utilize the minivan to pick up the other employees for transportation to the construction site (*see* Affirmation in Support of Defendant's Motion at Exh. D at pp. 7,9). He states that as he was on the entrance ramp to

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[1] By Decision dated November 18, 2007, summary judgment was granted in favor of defendant Biagio Vigliotti.

the Norther State Parkway, the minivan "started moving from side to side" and the steering wheel became unresponsive causing him to lose control of the vehicle (*id.* at pp.18,20). The defendant further testified that as a result of his inability to steer the vehicle, it rolled over at least two times and ultimately landed in a position with the tires facing skyward (*id.* at pp.19,20). Mr. Sanchez stated that during the two weeks prior to the subject accident he noticed that the minivan "would start going from side to side whenever I would drive around 65 miles per hour" and that he informed a manager at FML Construction of the problem (*id.* at p.13).

Plaintiff's Motion for Summary Judgment & Defendant's Motion for Summary Judgment:

The plaintiff now moves for summary judgment as to the issue of liability on the part of defendant Sanchez and co-defendant Luvin Construction. In support of the instant application, counsel for the plaintiff argues that the subject accident was solely caused by the negligence of defendant Sanchez in operating the minivan and that Luvin Construction, as owner of the minivan who gave defendant Sanchez permission to operate same, is vicariously liable to the plaintiff (*see* Affirmation in Support of Plaintiff's Motion at ¶15). Further, counsel maintains that neither defendant Sanchez nor defendant Luvin Construction has introduced any evidence which indicates that something other than their own negligence was the cause of the subject automobile accident (*id.* at ¶¶ 17,22,26,27,28).

The defendant opposes the plaintiff's application and simultaneously moves for summary judgment dismissing the plaintiff's complaint. Counsel contends that defendant Sanchez was not in any respect negligent but rather was confronted with an emergency situation as a result of a mechanical malfunction, which he neither created or contributed thereto, and acted reasonably under the circumstances (*see* Affirmation in Support of Defendant's Motion for Summary Judgment at ¶¶5,6). Counsel further contends that defendant's are entitled to summary judgment dismissing the plaintiff's complaint as the record herein is devoid of any evidence of negligence on the part of defendant Sanchez

which could have contributed to the subject accident (*id.* at ¶10).

Decision:

In the matter *sub judice*, the Court has searched the record with respect to the issue of the alleged liability of the co-defendant's herein, and upon such review grants summary judgment in favor of the defendants dismissing the plaintiff's complaint (CPLR§3212[b]; *see generally Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]). In searching the record, what clearly emerges is that the plaintiff, Segundo Quizhpe, was an employee of the defendant FML Construction [formerly d/b/a Luvin Construction] and that his injuries were sustained during the course of his employment. Further, what is equally evident is that defendant Jose I. Sanchez, who was driving the minivan, was a co-employee of the plaintiff.

In New York, it is well settled that the exclusive remedy available to an employee injured during the course of his or her employment by a co-employee is to file a claim for workers' compensation benefits (Workers' Compensation Law §§10,11,29[6]; *Cronin v Perry* 244 AD2d 448 [2d Dept 1997]; *Gonzales v Armac Industries, Ltd.*, 81 NY2d 1[1993]; *see also Constantine v Sperry Corporation*, 149 AD2d 395 [2d Dept 1989]). Thus, since the defendant Sanchez is statutorily immune from suit, Luvin Construction cannot therefore be held vicariously liable for the alleged acts of negligence of defendant Sanchez (*id.*; *see also Rodriguez v Lodato Rental, Inc.*, 267 AD2d 293 [2d Dept 1999]).

Moreover, where, as here, an employee has filed a workers' compensation claim and is receiving payments in connection with a particular accident, he may not thereafter maintain an action against his employer or co-employee for damages resulting from that same incident (*Torre v Schmucker*, 275 AD2d 365 [2d Dept 2000]; *French v Shaft*, 154 AD2d 336 [2d Dept 1989]; *Velasquez v Pine Grove Resort Ranch*, 61 AD2d 1102 [3d Dept 1978]). As noted hereinabove, the plaintiff testified during his sworn deposition that he has indeed filed a workers' compensation claim in relation to the subject accident and is receiving the sum of $400 per week. Accordingly, he is thereby precluded from

commencing an action against either his employer or his co-employee for those injuries sustained on July 21, 2006 and is constrained to seek redress via the exclusive remedy and recompense afforded under the statutory scheme (*Torre v Schmucker*, 275 AD2d 365 [2d Dept 2000], *supra*; *French v Shaft*, 154 AD2d 336 [2d Dept 1989], *supra*; *see also Beaucejour v General Linen Supply and Laundry Company Inc.*, 39 AD3d 444 [2d Dept 2007]; *Cronin v Perry*, 244 AD2d 448 [2d Dept 1997]; Workers' Compensation Law §§10,11,29 [6]).

As a final analytical point of some import, the Court notes that to allow the within action to proceed would constitute an impermissible invocation of the "dual capacity" doctrine, which permits an injured worker to maintain an action against his or her employer for acts or omissions undertaken by the employer in a capacity which exists outside the parameters of the particular employment relationship, such as where the employer is the owner of property (*Billy v Consolidated Mach. Tool Corp.,* 51 NY2d 152 [1980]; *Gonzales v Armac Industries Ltd.,* 81 NY2d 1 [1993]). More specifically, the doctrine provides that: "(A)n employer normally shielded from tort liability by the exclusive remedy principle (embodied in section 11 of the Workers' Compensation Law) may become liable in tort to his own employee if he occupies, in addition to his capacity as an employer, a second capacity that confers on him obligations independent of those imposed on him as employer" (*Billy v Consolidated Machine Tool Corporation*, 51 NY2d 152 [1980], *supra*).

This doctrine, while recognized in a minority of sister state jurisdictions has been repeatedly denied recognition by the highest court in this state (*id.*). In issuing a strenuous rejection of the doctrine and the underpinnings which inform same, the New York Court of Appeals has stated that "an employer remains an employer in his relations with his employees as to all matters arising from and connected with their employment. He may not be treated as a dual legal personality, 'a sort of Dr. Jekyl and Mr. Hyde'" (*Billy v Consolidated Machine Tool Corporation*, 51 NY2d 152 [1980] *supra*, quoting *Williams v*

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Hartshorn, 296 NY 49 [1946]). Therefore, to allow the within action to go forward, whereby the plaintiff seeks to hold Luvin Construction vicariously liable by virtue of it's status as owner of the subject minivan, would be to give operational effect to the principles of a doctrine which does not enjoy recognition in the annals of New York jurisprudence (*id.*).

Based upon the foregoing, the plaintiff's motion made pursuant to CPLR §3212 for an order seeking summary judgment as to the issue of the defendants liability is hereby **DENIED** and the motion by Luvin Construction Corporation and Jose I. Sanchez made pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiff's complaint is hereby **GRANTED.**

All applications not specifically addressed herein are deemed **Denied.**

This constitutes the Order of the Court.

Dated: 12/12/08

ENTER:

Dana Winslow

J.S.C.

ENTERED
JAN 02 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE